

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY HEIGHT, a/k/a KIMBERLY
WALLACE,

Plaintiff-Appellee,

v

STEVEN WALLACE,

Defendant-Appellant.

UNPUBLISHED
May 28, 2009

No. 284640
Oakland Circuit Court
LC No. 84-285424-DM

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order holding that defendant owes plaintiff \$4,680 in child support. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The parties are the parents of two children, Steven (DOB 06/07/81) and Michael (DOB 06/19/84). The parties were divorced in 1985. In 1990, the trial court entered an order providing for joint legal custody, plaintiff having physical custody of Steven, defendant having physical custody of Michael, and defendant paying \$20 per week to plaintiff for Steven's support. It does not appear that defendant paid much, if any, of this child support; the file includes numerous bench warrants and orders to show cause that were issued. By July 1994, defendant apparently owed \$3,175. A hearing was held, and as a result, the trial court entered an order abating child support. Specifically, the order stated:

CHILD SUPPORT FOR THE MINOR CHILD, STEVEN, D.O.B. 6-7-81,
SHALL ABATE EFFECTIVE JANUARY 15, 1994.

IT IS FURTHER ORDERED THAT SUPPORT SHALL RESUME AT \$20.00
PER WEEK PER CHILD, THROUGH THE OFFICE OF OAKLAND COUNTY
FRIEND OF THE COURT, SHOULD THE CHILD AGAIN RECEIVE PUBLIC
ASSISTANCE OR WHEN THE CHILD RETURNS TO LIVE WITH
PLAINTIFF MOTHER.

In 1999, plaintiff sought and received a court order establishing "sole legal and physical custody of Michael E. Wallace." In March 2007, plaintiff filed a motion for an order to show

cause, seeking to recover an alleged child support arrearage. In response, defendant filed a motion to modify the amount of support owed, stating that at that time the amount was in excess of \$5,300 and was “overwhelming” because he had been in prison from 1996 to 2006 and was unable to return to work. Defendant noted that support had been discontinued in 1994, and alleged that plaintiff was not owed support from that date forward.

The Friend of the Court referee issued a report and recommendation noting that child support had been abated in 1994 and that no later order reinstated it. Plaintiff had received state assistance from September 1989 until April 1996, so any support owed for that period was owed to the state, not to plaintiff. The referee stated that retroactive modification of child support was not allowed, and that plaintiff had a duty to inform the Friend of the Court if the child returned to her home after support had been abated. Plaintiff did not do so, and “[s]he cannot do so now” because both children were over 18 years old by then.

Plaintiff filed objections to the proposed order, arguing that she could prove the children lived with her during that period, including the 1999 court order restoring custody to her, and reiterating the 1994 abatement order that required support to recommence if plaintiff recovered custody of the children with no condition requiring her to notify Friend of the Court. The trial court held a de novo hearing at which plaintiff emphasized that she was not seeking retroactive modification of support, but instead sought enforcement of the 1994 order, which required support to recommence when plaintiff regained custody of the children. Defendant conceded that he was incarcerated from 1996 to 2006 and that he did not have custody from that time forward. The parties disputed the amount to be paid, with plaintiff’s counsel stating it was “\$20 per week, one child, \$35 per week, two,” and defense counsel stating, “It was \$20 per week because the father had custody of Steven. And the mother had custody of Michael so it was a—you had one, we had the other, that’s why they had \$20.”

As a result of that hearing, the trial court ruled:

The parties have stipulated that mother had custody of Steven Wallace DOB 6/7/81 from 1996 through 1999, and that she had custody of Michael Wallace DOB 6/19/84 from 1996 through 2002.

IT IS HEREBY ORDERED THAT Defendant, Steven Wallace, owes child support to Plaintiff Kimberly Wallace, in the amount of \$10 per week for three years with respect to their child, Steven Wallace, and \$10 per week for six years with respect to their child, Michael Wallace. The total amount of support owed to Plaintiff Kimberly Wallace is \$4,680.00.

The trial court denied defendant’s motion for reconsideration.

On appeal, defendant argues that the trial court erred in retroactively assessing child support, particularly for a period during which he was incarcerated. MCL 552.603(2) precludes retroactive modification of a child support order unless it applies to “a period during which there is pending a petition for modification.” Defendant concludes that this Court should enforce the statute as written and reverse the trial court’s improper, retroactive modification.

We review for an abuse of discretion the decision to award child support. *Phinisee v Rogers*, 229 Mich App 547, 558; 582 NW2d 852 (1998). We likewise review for an abuse of discretion the modification of child support. *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002). Questions of law are considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

The record shows that plaintiff is correct that she did not seek modification of child support but rather enforcement of an existing order. The 1994 abatement order clearly states that support “shall” resume when plaintiff regained physical custody. Nothing in the order conditioned the resumption of support on plaintiff notifying the Friend of the Court, and plaintiff asserted that she had not sought the arrearage earlier because defendant was in prison, and thus there seemed to be little point in doing so. This is not a case of the court changing the parent’s support obligation; defendant, being the party who sought the abatement, would be on notice that his obligation would recommence when plaintiff regained physical custody, and he would know that his incarceration would result in plaintiff having custody of both children. The trial court’s order merely enforces the 1994 order; it does not retroactively increase defendant’s support obligation.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jane E. Markey